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IN THE

Supreme Court of the United States

October Term, 1965
No. .....

KENNETH REYNOLDS WHEATON,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Response to Petition for a Writ of Certiorari to the California District Court of Appeal, Second District, Division Three.

Introduction.

Petitioner, Kenneth Reynolds Wheaton, having filed in this court a petition for writ of certiorari to the California District Court of Appeal in which he seeks reversal of a criminal conviction affirmed by that court, comes now respondent, the Attorney General of the State of California, and submits this response to said petition as requested by letter dated February 21, 1966, from the Clerk of this Honorable Court.

Statement of the Case.

After trial by jury in the Superior Court of Los Angeles County, petitioner was convicted of two counts of forging money orders, in violation of section 470 of the California Penal Code, and two counts of possessing blank money orders with intent to defraud, in vio-

lation of section 475 of the California Penal Code. He was duly sentenced to State Prison on the first two counts, and he appealed from the judgment. Division Three of the Second District Court of Appeal of the State of California affirmed petitioner's conviction in an unpublished[1] opinion filed July 30, 1965. A copy of that opinion is appended to petitioner's petition.

Petitioner's Contention.

Petitioner urges upon this court only one ground for the granting of a writ of certiorari. He maintains that the violation of a defendant's rights against self-incrimination enunciated in *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, should constitute reverisble error *per se,* and that where such a violation occurs no "harmless error" provision, such as Article VI, Section 4½ of the California Constitution, should be allowed to save the conviction from reversal. (Pet.[2] pp. 2-3.)

Reasons Why a Writ of Certiorari Should Not Be Granted.

The "Harmless Error" Provision of the California Constitution Does Not Conflict With the Federal Constitution and Is a Sound Provision of Law.

Petitioner's argument in this case strikes at the validity of Article VI, Section 4½ of the California Constitution. More familiarly known as the "harmless error rule" that section, enacted in 1911,[3] now provides:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirec-

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[1]Pursuant to Rule 976 of the California Rules of Court.

[2]Petitioner's Petition.

[3]And amended slightly in 1914.

> tion of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. [As amended November 3, 1914.]"

This case is not the only one in the current term of this court in which this provision of the California Constitution is under attack. Attention is also directed to *Daugherty v. California,* 743 Misc., and *Nelson v. California,* 595 Misc., other petitions for certiorari involving substantially the same question as presented here.

We think it axiomatic that "harmless error" provisions in the law of our different jurisdictions are beneficent provisions aimed at a worthy goal—the accomplishment of substantial justice. In *Smith v. United States,* 360 U.S. 1, 79 S. Ct. 991, 3 L. Ed. 2d 1041, this very court acknowledged that proposition. There it was said at 360 U.S. 9:

> ". . . Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused. e.g., Hagner v. United States, 341 U.S. 97, 71 S. Ct. 576, 95 L.Ed. 774; United States v. Debrow, 346 U.S. 374, 74 S. Ct. 113, 98 L.Ed. 92. *This has been a salutary development in the criminal law.* . . ." (Emphasis added.)

See also:

> *Brown v. Allen,* 344 U.S. 443, 460, 73 S. Ct. 397, 408-409;

Russell v. United States, 369 U.S. 749, 763, 82 S. Ct. 1038, 1046;

Bihn v. United States, 328 U.S. 633, 638, 66 S. Ct. 1174-1175;

Corpus Juris Secundum, Criminal Law, Section 1887, Volume 24A, pages 872-876.

Thus we think there can be no serious quarrel with the general intent of Article VI, Section 4½ of the California Constitution. We believe the only question here is whether that Section can or should be applied to a case wherein the prosecution has commented upon a defendant's failure to testify, or whether that act by the prosecution is so flagrant a denial of due process to the accused that it must be held reversible error *per se.*

The California Supreme Court has, within little more than the last year, had occasion to review completely the law relating to comment upon an accused's failure to testify. In February, 1965, that court decided *People v. Modesto,* 62 Cal. 2d 436, 42 Cal. Rptr. 417, 398 P. 2d 753. In that case in a lengthy opinion written by Chief Justice Traynor, a majority of the California Court held that comment upon an accused's failure to testify did not violate his rights against self-incrimination under the Federal Constitution. Within three months thereafter this court decided *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, and overturned the California Court by holding that comment upon an accused's failure to testify does violate his rights under the Fifth Amendment to the U. S. Constitution, made applicable to the States by the 14th Amendment to the U. S. Constitution.

But in *Modesto,* Justice Peters of the California Supreme Court, presaging the decision of this court in *Griffin,* dissented. He expressed the view that the California comment rule did violate an accused's constitutional rights. However he went on to say that in his opinion the error in commenting upon an accused's failure to testify would be subject to California's "harmless error" provision, *i.e.,* an appellate court would have to consider the entire circumstances to determine whether in a given case the unconstitutional comment amounted to reversible error. *People v. Modesto, supra,* at 62 Cal. 2d 454-464.

After this court's decision in *Griffin,* and under the impulse of that decision, the California Supreme Court, in *People v. Bostick,* 62 Cal. 2d 820, adopted what had been the dissent of Justice Peters only four months earlier, and held that the error in commenting upon a defendant's silence was, indeed, subject to Article ~~VI,~~ Section 4½ of the California Constitution.

We believe that this recent dialogue within the California Supreme Court offers abundant reason and authority in support of our position that comment upon an accused's failure to testify is not necessarily reversible error.

Wigmore apparently agrees with the conclusion of the California Supreme Court:

> "But there is no call for the stringent rule that a *new trial* shall be granted ipso facto where comment has been improperly made."
>
> 8 Wigmore on Evidence, Section 2272, page 436 (McNaughton rev. 1961).

While we must concede, in the light of the aforementioned cases, that error, in the form of comment upon petitioner's failure to testify, did occur in the instant case, we see nothing in the nature of that error which should compel the adoption of a formalistic rule that such error necessarily requires reversal. As pointed out by the California Supreme Court in *People v. Bostick, supra,* and by Justice Peters of that court, dissenting in *People v. Modesto, supra,* even this Honorable Court has recognized that not every violation of a constitutional right amounts to reversible error *per se.* We submit that not only is this approach to the problem of error sound, but furthermore it is the only truly reasonable and fair approach to the problem capable of giving to each side in a criminal lawsuit the fair trial to which it is entitled. If it can safely be said by a panel of experienced judges who have reviewed the entire record of a trial that a result more favorable to the accused would not have been likely in the absence of a given error, what useful objective is served by requiring a new trial? Indeed, is it not possible that the entire judicial process, and the public respect upon which it rests, is undermined by such a formalistic approach?

See:

Holtzoff, Shortcomings in the Administration of Criminal Law, 17 Hast. L. J. 17 at pp. 26-33.

We concede that where a coerced confession is introduced at trial, the error in admitting such a confession is reversible *per se.* The impact of a confession, a defendant's own incriminating words, is undeniably powerful. But the impact of merely pointing out to a jury something already obvious to them *i.e.,* the defendant's failure to testify, has no such devastating im-

pact. Respondent respectfully urges that psychological common sense dictates that where a criminal accused chooses to remain silent in the face of serious criminal charges his own self-imposed silence thunders more loudly in a jury's ears than anything that a prosecutor might be able to say with respect to that silence. Indeed, as this court said in *Griffin,* a prosecutor's comment upon an accused's silence may have some aggravating value in the weight of the case against the accused. But we submit that that quantum of aggravation is not so great that in the normal course of events it denies the accused due process to the extent that it should result in a new trial *per se.*

In another context the California Supreme Court has applied, we think correctly, the same principle we seek here.

In *People v. Parham,* 60 Cal. 2d 378, 33 Cal. Rptr. 497, 384 P. 2d 1001, that court held that the admission into evidence of items seized from a defendant in violation of his rights under *Rochin v. California,* 342 U.S. 165 [72 S. Ct. 205, 96 L. Ed. 183] was not reversible error where there was other compelling evidence of the defendant's guilt. As we read *Parham* that case stands for the sound proposition that the violation of a defendant's rights should not deprive society of the fair trial to which it, as well as the defendant, is entitled, unless the violation was a significant contributory factor in the accused's conviction.

Along those same lines, Justice Tobriner used the following language in *In re Lopez,* 62 Cal. 2d 368, 42 Cal. Rptr. 188, 398 P. 2d 380, which we consider to be highly relevant and significant at a point in our history when the competing considerations of the public's

right to protection from crime and the criminal's right to be fairly convicted are so noticeably in the public eye:

> ". . . We know now that we must choose here between competing values; we must seek to preserve a dynamic concept of constitutional right rather than sacrifice it upon an unrealistic and destructive altar of absolutism. . . ."
>
> *In re Lopez, supra,* at p. 379.

And continuing, Justice Tobriner said at pages 380-382:

> "Petitioner argues that because we deal with a constitutional protection we must apply it retroactively on collateral attack. In refusing to apply Mapp retroactively, the Court of Appeals for the Second Circuit met that argument as follows: 'It is pointed out that where constitutional rights are violated prejudice is presumed. It is our view, however, that the development of constitutional law calls into play precisely the same operations of the judicial process as does the development of a body of decisional law in any other field. The extent to which the new doctrine is to be applied should depend, in the language of Mr. Justice Cardozo, upon "considerations of convenience, of utility, and of the deepest sentiments of justice." ' (United States ex rel. Angelet v. Fay (1964) 333 F.2d 12, 16.)
>
> "Nor can we overlook the further consideration that retroactivity would impose impossible burdens upon the administration of criminal justice. Unlimited retroactive application of Escobedo would result in the reconsideration of countless cases that were correctly decided under the law in force at the time of trial; in many such cases witnesses

and evidence would no longer be available. Many hardened and dangerous criminals would glean the greatest profit from unlimited retroactivity; they serve lengthy sentences imposed long ago; their cases thus offer the least likelihood of successful retrial. To require a general release of prisoners of undoubted guilt would be to cripple the orderly administration of the criminal laws. (See United States v. Sobell (1963) 314 F.2d 314, 323, fn. 6, 324 (Friendly, J.); United States ex rel. Durocher v. LaValle (1964) 330 F.2d 303, 314, 315 (concurring and dissenting opinions); United States ex rel. Angelet v. Fay (1964) 333 F.2d 12, 20-21.)

"A ruling that Escobedo compelled retroactive collateral attack could well impede further developments in constitutional law. The absolute application of new interpretations, which on the surface appears as an instrument of fair play, in reality may stand as a formidable barrier to a dynamic application of constitutional standards. If every change must ipso facto be applied to all prior proceedings, no matter how ancient, future change may be put in jeopardy. (See United States ex rel. Angelet v. Fay (1964) 333 F.2d 12, 20-21; Freund, New Vistas in Constitutional Law (1964) 112 U.Pa. L.Rev. 631, 637-638.)

"We therefore conclude that because the justification of the requirement of the right to counsel at the accusatory stage lies in the prospective purpose of benefiting the overall system of criminal administration by drying up the sources of coercion, no purpose would be served by applying Escobedo retroactively." (Footnote omitted.)

We submit that this language, used in the context of deciding whether a constitutional right should be applied retroactively, applies equally to the consideration of whether a conceded error, but a slight and insignificant one, should formalistically result in reversal of convictions fairly gained under the law in existence at the time of trial, and where the newly discovered "error" played but a minor rule in securing of the conviction.

Conclusion.

For these reasons we respectfully request that petitioner's petition for certiorari be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WHEATON *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 46. Decided March 13, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case remanded for further consideration in the light of *Chapman* v. *California*, 386 U. S. —.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his concurring opinion in *Chapman* v. *California*, 386 U. S. —.